United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR THE APPELLANTS

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22031

STEWART L. UDALL, Secretary of the Interior, and GEORGE B. HARTZOG, JR., Director of the National Park Service,

Appellants

v.

D. C. TRANSIT SYSTEM, INC. (a District of Columbia corporation),

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CLYDE O. MARTZ,
Assistant Attorney General.

THOS. L. McKEVITT,
EDMUND B. CLARK,
Attorneys, Department of Justice,
Washington, D. C., 20530.

QUESTIONS PRESENTED

1. Whether the authority of the Secretary of the Interior to operate minibus service on property (the Mall) owned by the United States and administered by the Department of the Interior is superseded by the franchise granted D. C. Transit System, Inc., by the Act of July 24, 1956, 70 Stat. 598, to operate buses in the District of Columbia, and whether the assertion that the franchise did so limit the use of the Mall constituted an attempt to sue the United States.

2. Whether appellee made a sufficient showing of probable ultimate success and of threatened irreparable injury to sustain the issuance of a preliminary injunction.

I N D E X

CITATIONS

Cases:

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*/ Cases chiefly relied upon are marked with an asterisk.

I N D E X

CITATIONS

Cases:

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Cases cont'd: Page

Constitution and Statutes:

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OPINION BELOW

The district court's opinion, together with its findings of fact and conclusions of law, appears in the documents heretofore filed in this Court.

JURISDICTION

This is an appeal from the entry of a preliminary injunction. The jurisdiction of the district court was invoked under 28 U.S.C. secs. 2201, 2202; 5 U.S.C. sec. 1009 (now 5 U.S.C. secs. 701-704); and D. C. Code (1961 ed.) secs. 511-521. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1292(a)(1).

STATEMENT

1. General background. - In the summer of 1966, the National Park Service operated an experimental minibus service on the Mall area in Washington, D. C. This area, entirely owned by the United States, is a national park and has been assigned to the exclusive administration of the National Park Service. See the Act of July 1, 1898, 30 Stat. 570; the Act of February 26, 1925, 43 Stat. 983; and Executive Order No. 6166, dated June 10, 1933 (5 U.S.C. sec. 132 note; D. C. Code, sec. 8-108). The experimental service permitted visitors to the Mall to proceed from one point of interest to another, either in one trip or with interruptions, to visit particular attractions.

The following year, the National Park Service called for bids for operation of a service which would combine the movement of visitors with an interpretive service to be furnished by uniformed guides trained in the history and significance of the various buildings and memorials. The routes to be followed, the fees to be charged, the frequency of service and all details relating to the service were retained for final determination by the National Park Service. The proposal did not require that the service be provided on any particular schedule or over any given route.

After a contract had been awarded to the Universal Interpretive Shuttle Corporation, but before the service could be

initiated, the Washington Metropolitan Area Transit Commission sued to enjoin Universal from proceeding without first obtaining a certificate of public convenience and necessity from that Commission. D. C. Transit System, Inc., intervened in this action, contending that the proposed contract would interfere with its franchise rights. The United States also entered that case by filing a representation of interest. After trial, the district court dismissed the suit, holding (a) that the proposed service was not "mass transportation" within the meaning of the Act creating the Washington Metropolitan Area Transit Commission, (b) that even if so construed the proposed service was in effect to be furnished by the Federal Government and was therefore excepted from the jurisdiction of the Commission and (c) that D. C. Transit's franchise was not applicable for various reasons, including the fact that the proposed service was not one "which runs over a given route on a fixed schedule" within the meaning of Section 3 of the Act of July 24, 1956, 70 Stat. 598.

On appeal, this Court reversed, writing no opinion but entering an order stating that the "various relevant statutory provisions construed in relation one to the other" do not afford authority to provide the contemplated service without a Commission certificate. The Supreme Court granted certiorari on March 4, 1968.

2. Facts relating to this appeal. - In order to provide an interpretive service this summer for visitors to the

Mall, the National Park Service announced its intention to operate two buses beginning May 25, 1968, using rented vehicles and government personnel. In announcing this decision, it was stated that the service would be similar to that contemplated by the concession contract with Universal and that the service would be carried out in this manner pending resolution of the Supreme Court action.

This suit was instituted by D. C. Transit on May 9, 1968, seeking preliminary and permanent injunctive relief on the grounds (a) that the defendants were acting without authority in purporting to provide the proposed service and (b) that, in view of appellee's franchise, the proposed service could not be instituted without the issuance of a certificate by the Washington Metropolitan Area Transit Commission. The Commission is not a party.

In support of a motion for a preliminary injunction, appellee filed the affidavit of Mr. J. Godfrey Butler, stating (a) that appellee is now providing special sightseeing passenger services in the Mall area, including six specified tours, all described in an attached brochure as originating outside the Mall and all but one continuing on to other destinations; (b) that the service contemplated by the National Park Service will be operated "over a given route on a fixed schedule" and will be violative of Section 3 of appellee's franchise; (c) that the

contemplated transportation will be "completely destructive of plaintiff's existing service and will deprive plaintiff of substantial revenues which contribute to the financial soundness of its systemwide operations in the Washington area;" and (d) that, unless enjoined, "plaintiff is faced with great and irreparable injury and damage to the extent that the substantial revenues which will be taken away from it can never be recovered."

In opposition to the motion, appellants filed the affidavit of George B. Hartzog, Jr., Director of the National Park Service, which noted (a) that the proposed service would be operated by uniformed employees of the United States entirely within a park area under the jurisdiction of the National Park Service; (b) that the shuttle service would not be scheduled but would vary in times of departures, depending on the location and number of visitors in the park and the availability of equipment and personnel; (c) that the service would be basically identical with the interpretive service provided by the National Park Service in the fall of 1966; (d) that the proposed service would not result in loss of revenue to the appellee or other sightseeing companies; and (e) that sightseeing companies were presently permitted to operate on the Mall by sufferance and that no change in this situation was planned for the spring or summer.

Appellee then filed a second affidavit in which it stated (a) that appellee had two types of service operating on the Mall, one consisting of "regular route service" which crossed the Mall on Constitution, Independence and Pennsylvania Avenues and 1st, 4th, 7th, 12th, 14th, 17th and 23d Streets, and sightseeing tours which visited practically all of the buildings on the Mall; and (b) that if the United States carried out the proposed service appellee would sustain losses per year of approximately $1,275,000, consisting of $150,000 in regular route service, $750,000 in group charter sightseeing and $350,000 in daily sightseeing tours.

After a hearing, the district court found:

> 3. The proposed service will be operated over an established route between numerous points of interest on the Mall such as the Capitol, White House and Washington Monument.
>
> 4. The proposed service will not be scheduled but may vary in times of departures and operation.
>
> * * * * *
>
> 6. The proposed service will be competitive with both services presently rendered by Transit. While the precise amount of traffic to be diverted from Transit is not determinable, it may well represent over a million dollars in annual operating revenues.

The court then concluded:

> 1. Pursuant to the Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. §1, the Service has been authorized to promote and regulate the use of national park areas. As an incident to such general authority, the Service is authorized to

> operate a for-hire transportation service for the accommodation of park visitors. United States vs. Gray Line Water Tours of Charleston, 311 F2d 779, 781 (4th Cir. 1962).
>
> * * * * *
>
> The protective provisions of the Franchise restrict the Federal Government as well as private operators, applying to all areas of the District of Columbia including national parks. The service proposed by the Defendants, involving a bus operation over a given route on a fixed schedule competitive with Transit's existing operations in the Mall area of the District of Columbia, is subject to the provisions of the Franchise. Oriole Motor Coach Co. vs. Public Utils. Com'n., 111 F.Supp. 621, 622 (D.C. D.C. 1953).

Accordingly, on June 14, 1968, the court below granted appellee's motion and entered its injunctive order. This appeal followed.

STATUTES INVOLVED

Section 8-108 of the District of Columbia Code (1961 ed.) provides:

> The park system of the District of Columbia is placed under the exclusive charge and control of the Director of the National Park Service, under such regulations as may be prescribed by the President of the United States. [Act of July 1, 1898, 30 Stat. 570.]

The legislation creating the National Park Service, 16 U.S.C. (1964 ed.) sec. 1, provides in part as follows:

> There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge

of a director. The Secretary of the Interior shall appoint the director, and there shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

The pertinent provisions of the Act of July 24, 1956, 70 Stat. 598, are as follows:

Sec. 3. No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established to operate in the District of Columbia without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia (referred to in this part as the "Commission") to the effect that the competitive line is necessary for the convenience of the public.

* * * * *

Sec. 6. The Corporation is hereby authorized and empowered to engage in special charter or sightseeing services subject to compliance with applicable laws, rules and regulations of the District of Columbia and of the municipalities or political subdivisions of the States in which such service is to be performed, and with applicable provisions of the Interstate Commerce Act and rules and regulations prescribed thereunder.

STATEMENT OF POINTS

1. The district court erred in finding that the interpretive shuttle bus service on the Mall proposed by the Secretary of the Interior would be competitive with the regular and sightseeing bus service of D. C. Transit System, Inc.

2. The district court erred in concluding that the protective provisions of D. C. Transit System's franchise apply to the government-owned Mall.

3. The district court erred in concluding that the protective provisions of D. C. Transit System's franchise restrict the United States as well as private operators.

4. The district court erred in concluding that the service proposed by the Secretary of the Interior involved a bus operation over a given route on a fixed schedule. Finding No. 4 is to the contrary as to a fixed schedule.

5. The district court erred in concluding that the doctrine of sovereign immunity is not applicable in this case.

6. The district court erred in failing to dismiss D. C. Transit System's action.

SUMMARY OF ARGUMENT

The Mall is owned by the United States and Congress has delegated to the Secretary of the Interior the authority to administer it. Under this broad power of administration, the Secretary has the authority to operate the proposed interpretive shuttle bus service.

The D. C. Transit System's franchise to operate a commercial bus system in the District of Columbia neither expressly or impliedly indicates that its protective provisions should apply to the United States nor on land within the District of Columbia owned by the United States and devoted to national park use. Clearly, in the absence of such provisions, the protection from competition provision of the franchise is inapplicable to the United States and its property and will not support the injunction against operation by the Federal Government of the interpretive shuttle service on the Mall. Because the injunction interferes with the use and control of federal property, the suit is against the United States and should be dismissed for want of consent.

D. C. Transit has not shown sufficient likelihood of ultimate success in this suit nor irreparable harm to warrant issuance of the preliminary injunction. Apart from the basic issue, it is doubtful if the interpretive shuttle is in competition with D. C. Transit and no support is shown for the alleged prospective loss of revenues.

ARGUMENT

I

THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO ADMINISTER THE MALL AS A NATIONAL PARK WAS NOT SUPERSEDED OR LIMITED BY THE FRANCHISE GRANTED D. C. TRANSIT SYSTEM TO OPERATE BUSES IN THE DISTRICT OF COLUMBIA

A. The district court correctly concluded that operation of the proposed minibus service was within the authority of

the Secretary of the Interior. - The Mall is a park owned by the United States. The Constitution, Article IV, Section 3, commits the management and control over the lands of the United States to Congress. The Government's power is absolute. Gibson v. Chouteau, 13 Wall. 92, 99 (1872); Ruddy v. Rossi, 248 U.S. 104, 106 (1918).

The paramount power of the Federal Government over its lands under the Property Clause of the Constitution over state enactments was expressed in Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917), as follows:

> * * * the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. "A different rule," as was said in Camfield v. United States, supra [167 U.S. 518 (1897)] "would place the public domain of the United States completely at the mercy of state legislation."

Congress may delegate its power over the public lands to the executive. Best v. Humboldt Mining Co., 371 U.S. 334, 336-338 (1963); Boesche v. Udall, 373 U.S. 472, 476 (1963). Congress has charged the Secretary of the Interior with the management and disposition of the national parks (16 U.S.C. sec. 407a). As the district court recognized, operation of transportation service for the accommodation of park visitors has been

specifically accepted as within the Secretary's authority. In United States v. Gray Line Water Tours of Charleston, 311 F.2d 779, 781 (C.A. 4, 1962), the court in upholding a preferential concession by the Department of the Interior to a private entrepreneur to use a government pier at Ft. Sumter national monument concluded:

> The concession, we hold, was quite within the purpose and intendment of the Act setting Fort Sumter apart as a national monument. The Congress declared it should be "for the benefit and enjoyment of the people of the United States" but, obviously, to be made available to the public, water craft of some kind had to be provided. It, of course, could be undertaken either by the United States directly or through a private waterman.

B. The terms of D. C. Transit System's franchise have no application to the federally-owned Mall. - The district court has concluded that "The protective provisions of the Franchise [i.e., no competition] restrict the Federal Government as well as private operators, applying to all areas of the District of Columbia including national parks." The Supreme Court clearly precluded such a conclusion in United States v. Wittek, 337 U.S. 346 (1949). That decision is particularly appropriate to the instant case. Wittek concerned the applicability of the District of Columbia Emergency Rent Act to government-owned housing. In holding the District Act inapplicable, the Court stated (337 U.S. at 358-360):

> A general statute imposing restrictions does not impose them upon the Government itself

> without a clear expression or implication to that effect. The text, surrounding circumstances and legislative history of this District Act neither express nor imply a change in the authority already vested in permanent federal agencies in their management of the Government-owned housing in the District.

Here, the franchise and related statutes do not merely "neither express nor imply a change in the authority already vested in" the Secretary of the Interior. The very Act creating the Washington Metropolitan Area Transit Commission, from which a potential competitor of D. C. Transit would have to secure a certificate of public convenience and necessity, excludes from the Commission's jurisdiction "transportation by the Federal Government." 74 Stat. 1035-1036.

Put another way, D. C. Transit has claimed, and the district court has sustained, an asserted right in the federally-owned Mall. Again, the Supreme Court has precluded such a result in Chapman v. Sheridan-Wyoming Co., 338 U.S. 621 (1950), where, in refusing to uphold a similar claim to limit the Secretary of the Interior in authorizing use of federal property, it stated (at p. 627):

> But whatever we might determine to be the technical nature of the collateral property right claimed to result from Sheridan's lease, to any extent that it added a property right to the plaintiff's lands it created an incumbrance or subtraction from the aggregate of rights in the United States. Courts would not lightly imply against any land owner a covenant which would restrict alienation or enjoyment of his estate. There are even stronger reasons against implied covenants imposing easements, servitudes, amenities or restrictions upon the public lands.

Whichever view we take of this injunctive action against the operation of the minibus by the Federal Government on federally-owned property, it is clearly a suit to enjoin or control the United States in the operation of its own property and, hence, is necessarily an assertion of some right however defined, in that property. The action should be dismissed as an unconsented suit against the United States. Dugan v. Rank, 372 U.S. 609 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962); Gardner v. Harris, 391 F.2d 885 (C.A. 5, 1968), dismissing a suit against a government official to obtain access to Natchez Trace Parkway; Switzerland Company v. Udall, 337 F.2d 56 (C.A. 4, 1964), cert. den., 380 U.S. 914, dismissing a suit against a government official to obtain access to Blue Ridge Parkway.

II

A SUFFICIENT SHOWING OF PROBABLE ULTIMATE SUCCESS AND IRREPARABLE INJURY TO SUSTAIN A PRELIMINARY INJUNCTION HAS NOT BEEN MADE

A. Appellee did not show probable ultimate success. - We have already shown in Point I, supra, the reasons why there should be little chance of ultimate success on the basic issue. But, apart from the basic issue, the proposed service does not conflict with the noncompetitive provision of the franchise. Thus, D. C. Transit's franchise obviously applies to regular route service, such as that which moves people throughout the city on regularly scheduled lines. It has no application to a

sightseeing service, the only matter involved here.[1/]

Moreover, the service that the Secretary intends to provide is not one that will operate "over a given route on a fixed schedule." This is established by the affidavit of the Director of the National Park Service, pointing out that there will be no fixed schedule and that the service will necessarily vary with the availability of equipment and the number of visitors.[2/] There will not be the announced schedule of daily operations in reliance of which prospective users can adjust their planned activities, as is the case of the overwhelming number of uses of regular D. C. Transit service. Nor does appellee enjoy an exclusive franchise with respect to sightseeing activities in the District of Columbia. It so happens that other sightseeing companies must obtain a certificate from the Washington Metropolitan Area Transit Commission but they must

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1/ There is no logic to appellee's contention that the proposed minibus service will have an effect on the through lines which cross the Mall. As a matter of fact, most of the people who ride these lines are local residents who routinely cross the Mall on their way to work. Those who use these lines to reach the Mall obviously would continue to do so, even if the minibus service were operating.

2/ Section 3 of the Act of July 24, 1956, 70 Stat. 593, adopts the language of Section 4 of the Act of January 14, 1933, 47 Stat. 752, 760, which granted a franchise to appellee's predecessor. See Capital Transit Co. v. Safeway Trails, 201 F.2d 708 (1953), where it was argued that the commuter service there involved (which was not a sightseeing service) ran on a given route over a fixed schedule.

do so in view of the general jurisdiction of that Commission--not by reason of Section 3 of the franchise Act. This particular point was raised by D. C. Transit in the earlier litigation. It was rejected by the trial court and not discussed by the court of appeals. In that case, the trial court said:

> Initially it is difficult to characterize the proposed operations of the shuttle service as proceeding over "a given route" on a "fixed schedule" when it is apparent from the contract with the defendant Universal that the Secretary has not designated a route, has not designated a schedule, and reserves the right to direct how the shuttle service shall be conducted at any given time. But wholly aside from that observation, it appears to the Court that D. C. Transit is overreaching when it claims Section 3 protection against this shuttle service. In our opinion, what Congress intended to give the D. C. Transit was protection in the operation of its day to day activities in the mass movement of the public of Washington, D. C. over the D. C. streets. What the Secretary is proposing to do is in no wise competitive with that fundamental function of the D. C. Transit System.

In Virginia Petroleum Job. Ass'n v. Federal Power Com'n, 259 F.2d 921 (1958), this Court pointed out that in situations of this type an answer must be sought to the question: "Where lies the public interest?" The answer is that operation of the service will definitely aid the public interest. In fact, the entire plan was evolved to aid the public. The success in 1967 of the interpretive tours established its popularity and similar services, such as at Williamsburg, have contributed to the public's appreciation of sites of national interest.

B. Appellee did not establish irreparable injury. - As noted in the Statement, the appellee's original affidavit contained a conclusory statement that operation of the proposed service would cause appellee irreparable damage. When this generality was challenged, a second affidavit was filed, asserting that operation of the service could cost D. C. Transit $1,275,000 a year in combined losses attributable to regular route service and sightseeing operations. No data were offered to back up these extraordinary assertions. In particular, it is not claimed that D. C. Transit incurred any loss in 1966 during the time the experimental service was in operation. On the other hand, the Hartzog affidavit points out that operation of the service will not result in termination of the tours now conducted by the appellants and that the two types of operation will not be in competition but will be complementary. D. C. Transit now picks up its customers primarily at its downtown headquarters at 1422 New York Avenue, N.W., brings them to the Mall and, in most cases, continues the tours on to other points of interest. The proposed service will be available only for people already at the Mall. The possibility of irreparable injury is remote indeed.

CONCLUSION

For the foregoing reasons, the order of the district court should be reversed and the preliminary injunction set aside.

Respectfully submitted,

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JUNE 1968.

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BRIEF FOR THE APPELLEE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,031

STEWART L. UDALL, Secretary of the Interior, and GEORGE B. HARTZOG, JR., Director of the National Park Service,

Appellants

v.

D. C. TRANSIT SYSTEM, INC. (a District of Columbia corporation),

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether the Secretary of the Interior has the statutory authority to engage in for-hire transportation operations in a national park in the District of Columbia.

2. Whether the franchise granted to D. C. Transit System, Inc. by the Congress protects it against competitive operations proposed by the Government.

3. Whether Appellee made a sufficient showing to sustain the issuance of a preliminary injunction.

CITATIONS

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior has the statutory authority to engage in for-hire transportation operations in a national park in the District of Columbia.

2. Whether the franchise granted to D. C. Transit System, Inc. by the Congress protects it against competitive operations proposed by the Government.

3. Whether Appellee made a sufficient showing to sustain the issuance of a preliminary injunction.

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CITATIONS

RESTATEMENT OF FACTS

With two exceptions, the statement of facts presented by the Appellants need not be rephrased for purposes of this argument. These two exceptions deal with the route and schedule to be followed in the performance of the proposed service. As Appellants have noted on pages 4 and 5 of their brief, such service will be "similar to that contemplated by the concession contract with Universal" and will be "basically identical with the interpretive service provided by the National Park Service in the fall of 1966". Accordingly, the route and schedule of the proposed service will be substantially that described in the Prospectus issued by the National Park Service ("Service") following its own experimental operation in 1966 and preceding the award of the concession contract to Universal. A copy of the Prospectus has been attached in the Appendix hereto.

The route to be followed is described in general terms on page 1 of the Prospectus as follows:

> ...between the U.S. Grant Memorial at First Street on the East, the Lincoln Memorial on the West, the White House to the North, and the Thomas Jefferson Memorial on the South, more specifically delineated on the attached map and folder describing pilot operation conducted experimentally by the Government in the Fall of 1966.

On the map to which reference is made, bright red arrows are used to mark the "Shuttle Tour Route" and bright

red stars are used to mark the 11 "Shuttle Stops".

The schedule to be followed is described on page 4 of the Prospectus as follows:

> Sufficient equipment will be required to operate three trips per hour within four months after the concession contract has been executed by the Government and sufficient additional equipment to operate a minimum of 12 trips per hour, within one year from such date of execution. The service is to be available between the hours of 9:00 a.m., and 10:00 p.m., from April 15 through Labor Day each year, and between the hours of 9:30 a.m., and 5:00 p.m., the remainder of the year. A time schedule for providing the service will be subject to negotiation with the successful applicant.

The schedule to be followed may, however, vary depending on the number of visitors and the availability of equipment and personnel.

In passing, it is noted on page 5 of Appellant's brief that the fifth word in the first line should read "competitively" and not "completely".

STATEMENT OF POINTS

1. The service proposed by the Appellants has no statutory foundation.

2. The protective provisions of D. C. Transit System's franchise apply to the Government as well as to private operators.

3. The service proposed by the Appellants will be competitive with existing service operated by D. C. Transit System in the District of Columbia.

4. The service proposed by the Appellants will be operated over a given route on a fixed schedule.

5. The doctrine of sovereign immunity is not applicable.

6. The issuance of the preliminary injunction was warranted.

SUMMARY OF ARGUMENT

Notwithstanding the broad authority which Congress has vested in the Secretary of the Interior ("Secretary") to administer the national park system, the Secretary has not been authorized to engage in for-hire transportation operations in the national parks as a governmental function. The Secretary therefore lacks authority to perform the proposed service in the Mall Area of the District of Columbia.

Even if the Secretary has authority to operate the proposed service, he must still comply with the Congressional franchise of D. C. Transit System ("Transit") which protects the Company against all competitive operations, public as well as private, that are proposed to be established in the District of Columbia "over a given route on a fixed schedule". The proposed operation is substantially of the nature proscribed and therefore cannot be conducted without a certificate of public convenience and necessity.

The United States is not an indispensable party and its consent to this action is not necessary because the Appellants are being sued in their individual capacities for having exceeded the scope of their authority and for having exercised their authority in a manner which deprives Transit of a property right, its franchise, without due process.

ARGUMENT

I

The Secretary of the Interior Has No Authority to Engage in For-Hire Transportation Operations in the Mall Area of the District of Columbia

The District Court found that pursuant to the Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. §1, authorizing the Service to promote and regulate the use of national park areas, the Service has incidental authority to operate a for-hire transportation service for the accommodation of park

visitors. The case of United States v. Gray Line Water Tours of Charleston, 311 F.2d 779, 781 (4th Cir. 1962) is cited as support therefor. It is respectfully submitted that such finding is erroneous and that the Gray Line case is not controlling.

The fundamental purpose of the Act of 1916 is the preservation and conservation of national park areas. Standing alone it might well be argued that the achievement of such broad purpose required the Service to become a motor common carrier. However, the failure of the Congress in the Act of 1916 to authorize the proposed operations as a governmental function is indicated by three later enactments: The Act of August 8, 1953, 67 Stat. 495, 16 U.S.C. §1b; the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. §20a; and the Act of March 12, 1968, 82 Stat. 43 (Public Law 90-264).

The Act of August 8, 1953 authorized the Secretary to operate a for-hire motor carrier service for his employees at the Carlsbad Caverns National Park in New Mexico. In a letter of July 24, 1953, to the Chairman of the Senate Committee on Interior and Insular Affairs, the Interior Department made the following statement in its legislative comments on the bill enacted on August 8, 1953:

> This proposed legislation is designed to provide essential housekeeping authority that is needed to manage efficiently the national park system. The provisions of this bill are limited to those matters that are important in the management of that system and are founded upon many years of experience in that field... It is important that our administrative authority

> in this field keep pace with our responsibilities.
>
> 1953 U.S. Code Cong. and Adm. News, pp. 2241-42.

In other words, the legislative history of this Act confirms that prior to 1953 the Service had no authority, incidental to the Act of 1916, to perform motor common carrier services even for its own employees. No enactment since 1953 has given the Service any authority to perform such services.

It is also noteworthy in passing that this Act specifically prohibited the Secretary from performing for-hire transportation services "if adequate transportation facilities are available...by any common carrier at reasonable rates..." This congressional directive that the Secretary keep out of the transportation business as long as adequate service is available from private sources has been reaffirmed in subsequent legislation.

The Act of October 9, 1965 specifically provides that the Secretary "shall take such action as may be appropriate to encourage and enable private persons and corporations (hereinafter referred to as 'concessioners') to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service". This provision again makes it clear that Congress intends for private persons and not the Federal Government to provide the services in dispute herein.

Finally, the recent legislative history of the National Visitor Center Facilities Act of 1968, Public Law 90-264 (H.R. 12603), sheds further light on this question of the Secretary's statutory authority.

As initially introduced, H.R. 12603 contained language in Section 5 which specifically directed the Secretary to provide transportation of visitors by the United States in the Mall Area. Such language, however, was deleted from the bill as reported by the House Committee on Public Works, and as later passed by the House, which substituted therefor a requirement that the Secretary report to the Congress by January 15, 1968, the results of a complete study of the problems of transporting visitors along the Mall and its vicinity. House Report No. 810 of the 90th Congress, dated October 23, 1967, page 5.

In commenting to the Senate Committee on Public Works, on H.R. 12603 as passed by the House, the Interior Department extensively discussed the need for legislation to authorize it to perform service similar to that proposed herein and recommended an amendment to H.R. 12603 which would have provided such specific authority. Senate Report No. 959 of the 90th Congress Accompanying H.R. 12603 (February 5, 1968), pages 9-10.

The deletion of Section 5 of H.R. 12603 as introduced and the subsequent refusal of the Congress to adopt the amendatory language recommended by the Department is strong evidence

of the continuing Congressional intent to withhold authority from the Service to perform transportation for hire as a governmental function. Compare, for example, the Alaska Railroad Act, Act of March 12, 1914, 38 Stat. 305, as amended, 48 U.S.C. §301, and Executive Order No. 3861, June 8, 1923, 48 C.F.R. §5.1, which specifically authorized the Secretary to engage in the transportation of passengers for hire.

In United States v. Gray Line Water Tours of Charleston, supra, the Court held that the Secretary has authority to grant a preferential concession to a private entrepreneur which excludes all other private operators. It stated, as dictum, that the Secretary also has authority to perform for-hire transportation services himself. It is submitted that such dictum is incorrect for the reasons discussed hereinabove. Furthermore, even if correct, it would seem that the application thereof should be limited to the peculiar circumstances of the Federal property involved. Fort Sumter is not accessible by land.

II

The Franchise of D. C. Transit System, Inc. Applies to the Operations Proposed by the Secretary of the Interior, Through the National Park Service, in the District of Columbia

The District Court found that the protective provisions of the Franchise restrict the Federal Government as well as private operators, and apply to all areas of the District of

Columbia including national parks. The District Court further found that since the service proposed by the Appellants involves an operation over a given route on a fixed schedule competitive with Transit's existing operations in the Mall Area of the District of Columbia, the service proposed is subject to the Franchise. It is submitted that such finding is entirely sound.

To begin with, the Franchise, Act of July 24, 1956, 70 Stat. 598, would be almost meaningless if it applied only to private operators. What incentive would there have been for Transit to make the substantial capital contribution necessary to operate a "mass transportation system of passengers" throughout the Washington Metropolitan Area if the Federal Government could come along at any time and establish a competitive service? The very language of Section 4 of the Franchise makes it clear that the Congress intended to keep public officials out of the transportation business in the District of Columbia. Section 4 states:

> It is hereby declared as a matter of legislative policy that in order to assure the Washington Metropolitan Area of an adequate transportation system operating as a private enterprise... (underscoring added)

Moreover, the legislative history of the Franchise makes it clear that Congress did not contemplate the provision by public officials of transportation services competitive with Transit. S. 3073 of the 84th Congress, which

ultimately was enacted as the Franchise, initially provided for the operation of the transportation system in the Washington Metropolitan Area by a public body corporate, the Washington Metropolitan Area Transit Authority consisting of the Commissioners of the District of Columbia. (See Report No. 1791 of the 84th Congress, 2d Session, accompanying S.3073, dated April 20, 1956.) This public ownership approach passed the Senate but was entirely rejected by the House of Representatives, leading to a conference report, pursuant to which S. 3073 was amended to provide for the grant of a franchise to Transit. (See House Report No. 2751 of the 84th Congress, 2d Session, accompanying S. 3073, dated July 17, 1956.)

In short, the language, surrounding circumstances and legislative history of the Franchise, provides a clear expression of Congressional intent to impose the restrictions set forth in Section 3 of the Franchise upon the Government itself. United States v. Wittek, 337 U. S. 346, 358-60 (1949). While, as noted on page 13 of Appellants' brief, Section 1(a) of Article XII of the Washington Metropolitan Area Transportation Regulation Compact ("Compact"), Act of September 15, 1960, 74 Stat. 1031, 1035-6, D. C. Code §1-1410, specifically excludes "transportation by the Federal Government" from the regulatory jurisdiction of the Washington Metropolitan Area

Transit Commission, such exclusion does not change the protection afforded Transit by its Franchise. Under Section 3 of the legislation consenting to the Compact, 74 Stat. 1050, D.C. Code §1-1412, it is provided that nothing therein shall "impair or affect the rights, duties, and obligations created by the Act of July 24, 1956...granting a franchise to D. C. Transit System, Inc."

In passing, the argument of the Appellants that the Franchise was not intended to apply to the Government was not raised at the trial and therefore should not have been raised on appeal. Miller v. Avirom, (D.C. Cir., 1967) 384 F2d 319.

As the protective provisions of Section 3 of the Franchise clearly apply to all areas of the District of Columbia, including national parks, the only relevant questions to be answered are whether the proposed service will "compete" with Transit's existing service and whether the proposed service will be operated "over a given route on a fixed schedule".

As noted in the Supplemental Affidavit of William E. Bell in support of Plaintiff's Motion for Preliminary Injunction, the contemplated service will "compete" with both types of operations Transit is conducting on the Mall. Visitors who now use Transit's regular route service to go from the Capitol to the White House or from the Captiol to the National Gallery of Art, for example, would be able to use the service

of the Appellants as an alternate means of transportation. It is estimated that approximately $150,000 of Transit's present revenues will be diverted annually as a result of such competition.

As further pointed out by Mr. Bell, the greatest impact of the contemplated service will be felt by Transit's sightseeing operations. When it is considered that the contemplated service will duplicate Transit's existing sightseeing service in the following four fundamental respects, it is obvious that the two services will be competitive:

1. Operating over substantially the same streets, both inside and outside the Mall;
2. Providing a service attractive to the same class of persons - tourists;
3. Employing guides particularly knowledgeable about local points of interest;
4. Providing service to essentially the same points of interest.

The competitive impact of the contemplated operation on Transit's existing sightseeing services on the Mall, individual and group, was estimated by Mr. Bell at over a million dollars annually.

As the revenues Transit will lose to the proposed service can never be recovered through the fare box, Transit

will be irreparably injured. The operation contemplated by the Appellants will be operated over a "given route on a fixed schedule". As noted in the map attached to the Prospectus, the experimental operation conducted by the Service in 1966, which it proposes to repeat now, followed a clearly delineated route. Moreover, as further noted in the Prospectus (page 4), the schedule of operations which the concessioner contracted to provide, and which now the Service will provide involves a daily service between the hours of 9:00 A.M. and 10:00 P.M. While, as noted in the Affidavit of Appellant Hartzog, times of departure may vary depending on the availability of passengers, equipment, and drivers, it is submitted that such variances will not change the fundamentally or substantially "fixed" character of the schedule to be operated by the Appellants. Surely, it would not seem that the Congress intended to allow persons to avoid the restrictions imposed under Section 3 of the Franchise by merely declaring in self-serving fashion that the schedule "may vary" once in awhile if a driver doesn't show up or a bus has a flat tire.

Finally, Appellants suggest that sightseeing operations are not covered by Section 3 of the Franchise. Appellants' contention is apparently based on the conclusion that the "mass transportation system" described in Section 1 was not intended to cover sightseeing operations specifically authorized in Section 6. Such conclusion is faulty.

There is nothing in Section 1 which evidences a

Congressional intent to exclude sightseeing operations from the definition of "mass transportation". Since Transit's sightseeing operations, like those proposed by the Appellants, are made available to millions of visitors annually attracted to the Mall, it would seem clear that such operations are a form of "mass transportation" in the District. This does not mean that Section 6 is merely a redundant provision. Without it there would be substantial doubt as to whether the Congress intended to allow Transit to perform services beyond the Washington Metropolitan Area and subject to the regulation of the Interstate Commerce Commission, among others.

While it is certain that the protection afforded Transit operates only against a competitive service running "over a given route on a fixed schedule", there is absolutely nothing to suggest that conversely such protection is afforded only to Transit's service running "over a given route on a fixed schedule". In terms of lost passengers and revenues, the competitive impact on Transit is not in any way changed by the fact that its existing service being duplicated is a sightseeing operation as distinguished from a regular route operation which runs "over a given route on a fixed schedule".

In this connection, it should be emphasized that since Section 3 of the Franchise followed almost word for

word the language of Section 4 of the so-called Merger Act, Act of January 14, 1933, 47 Stat. 760, D. C. Code §44-201, it would appear that Congress has thereby ratified the court decisions which defined the scope of the protection afforded by Section 4 of the Merger Act. Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 114-15 (1939). One such decision held that:

> The unequivocal language of the statute is sufficiently comprehensive to cover all kinds of operations of a competitive bus line, be they intrastate or interstate. Oriole Motor Coach Co. v. Public Utils. Com'n., 111 F. Supp. 621, 622 (D.C.D.C. 1953)

In view of the foregoing, the proposed operation is illegal because it is not authorized by statute and, even if so authorized, not certificated in accordance with the protective provisions of Transit's Franchise.

III

The Doctrine of Sovereign Immunity Is Not Applicable

The final argument of the Appellants is that Transit's action must be dismissed as an unconsented suit against the sovereign. The general rule with respect to sovereign immunity was stated in Dugan v. Rank, 372 U.S. 609, 620 as follows:

> The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration'. Land v. Dollar, 330 U.S. 731, 738, or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act'. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704.

The Court went on, however, to describe two recognized exceptions to the general rule as follows (372 U.S. 621):

> Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constituonally void. In either of such cases the officer's action 'can be made the basis of a suit for specific relief against the officer as an individual'. Malone v. Bowdoin, 369 U.S. 643, 647.

In this instance the action contemplated by the Appellants is beyond the scope of their statutory authority and, even if within such scope, is being exercised in a manner depriving Transit of a property right, its Franchise, without due process of law. Monongahela Nav. Co. v. United States, 148 U.S.312 (1892) and Frost v. Corporation Commission, 278 U.S. 515 (1929). Under the circumstances,

the United States is not an indispensable party and the principle of sovereign immunity is not applicable.

CONCLUSION

For the foregoing reasons, a sufficient showing of probable ultimate success and irreparable injury has been made to sustain the District Court's issuance of a preliminary injunction.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Brief has been hand delivered to Thomas L. McKevitt, Department of Justice, Washington, D. C. 20530, this 26th day of June, 1968.

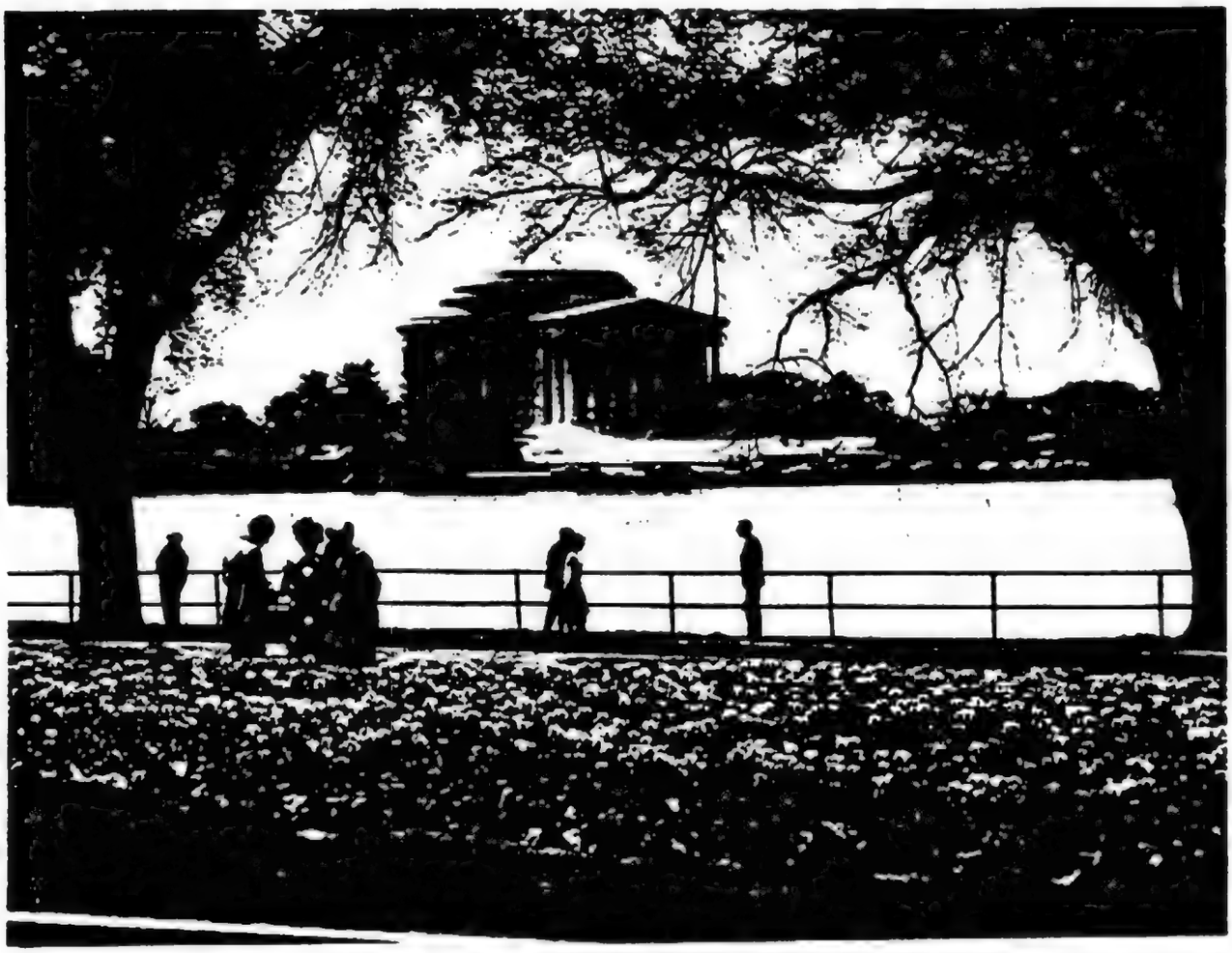
Manuel J. Davis

PROSPECTUS

Visitor Interpretive Shuttle Service

NATIONAL CAPITAL REGION
NATIONAL PARK SERVICE

Washington, D. C.



Thomas Jefferson Memorial

P R O S P E C T U S

The Department of the Interior is seeking a qualified and competent concessioner to provide, operate, and maintain a high quality Visitor Interpretive Shuttle Service on a year-round basis (except Christmas Day) covering areas under the jurisdiction of the National Park Service, in the city of Washington, D. C., between the U.S. Grant Memorial at First Street on the East, the Lincoln Memorial on the West, the White House to the North, and the Thomas Jefferson Memorial on the South, more specifically delineated on the attached map and folder describing pilot operation conducted experimentally by the Government in the Fall of 1966. A summary report of the pilot operation is available in the office of the Regional Director, National Capital Region, 1100 Ohio Drive, S.W., Washington, D. C. Some flexibility is desirable in this routing and may include service to other centers of interest in the Federal establishment.

This prospectus is being issued by the National Park Service in an effort to evoke the widest possible interest in making such service available to visitors to the Nation's Capital and to inform interested parties of the requirements and conditions under which such an operation may be conducted. This prospectus is related only to the Visitor Interpretive Shuttle Service described herein, and no other services or facilities are contemplated or will be authorized. It is anticipated that service hereunder should begin on or before April 15 by the successful proponent. In the event proponents cannot meet this schedule, each should indicate the earliest date upon which such service can be inaugurated. Substitute equipment approved by the Service may be utilized temporarily.

General Area Information

The National Capital Parks are comprised of 780 units in the District of Columbia, Maryland, and Virginia, totaling more than 32,000 acres of park land and are scattered throughout the metropolitan area of Washington. The administration of these areas falls within the administrative responsibilities of four Superintendents. Only one Superintendent will be concerned with the herein described operation.

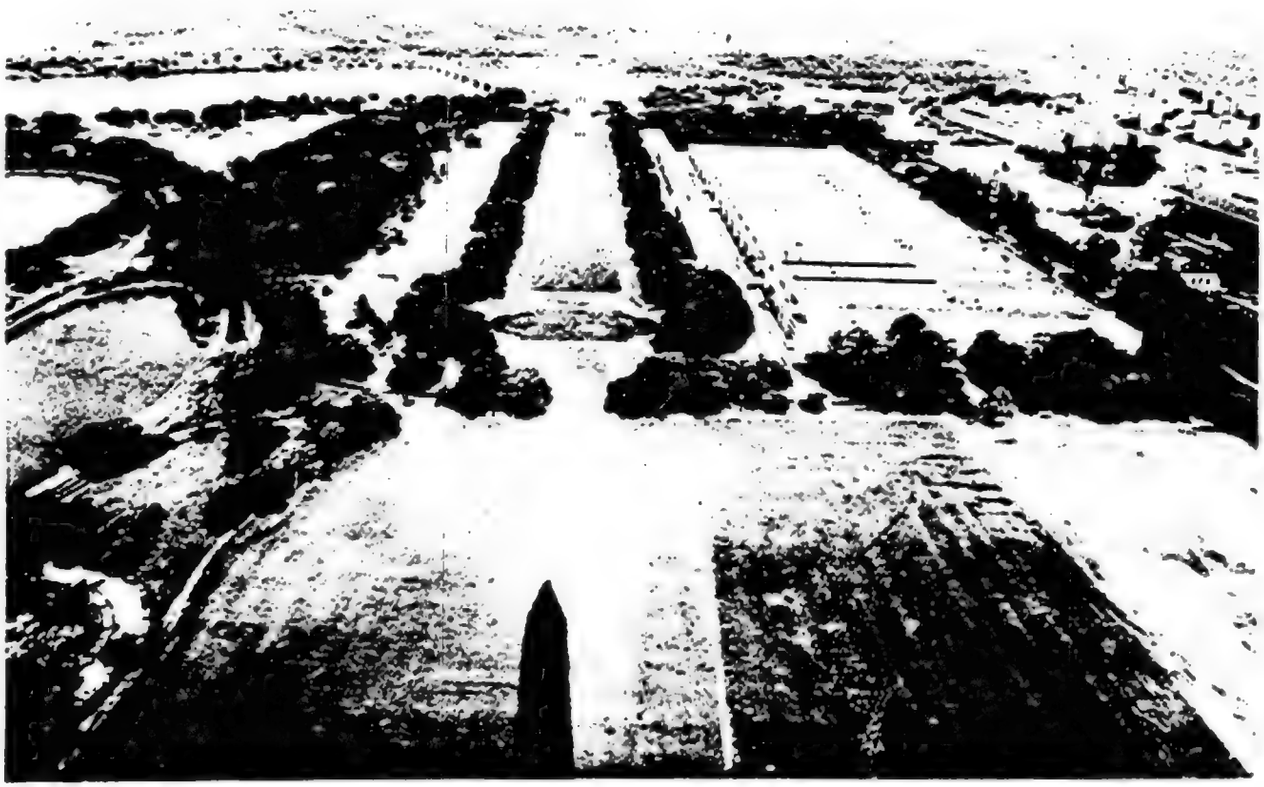
The Washington metropolitan area, with a population of approximately 2,474,000, has an average rainfall of 40 inches, and an average of 112 inclement days during the year. The approximate average temperatures for the four seasons are: Winter, 48 degrees; Spring, 75 degrees; Summer. 83 degrees; and Fall, 57 degrees.

A survey made by the Stanford Research Institute in 1961 estimated that 15.4 million people had visited Washington in 1960 and projected that 24 million people would visit the area by 1970 and 35 million by 1980.

Attached hereto and made a part of this prospectus is a tabulation of the annual visitation for 1965 and 1966 calendar years to the principle centers of interest along the proposed Visitor Interpretive Shuttle Service.

Existing Facilities

The route of the proposed Visitor Interpretive Shuttle Service will be on surfaced streets or roadways under the administrative jurisdiction of the



View from Washington Monument looking West.

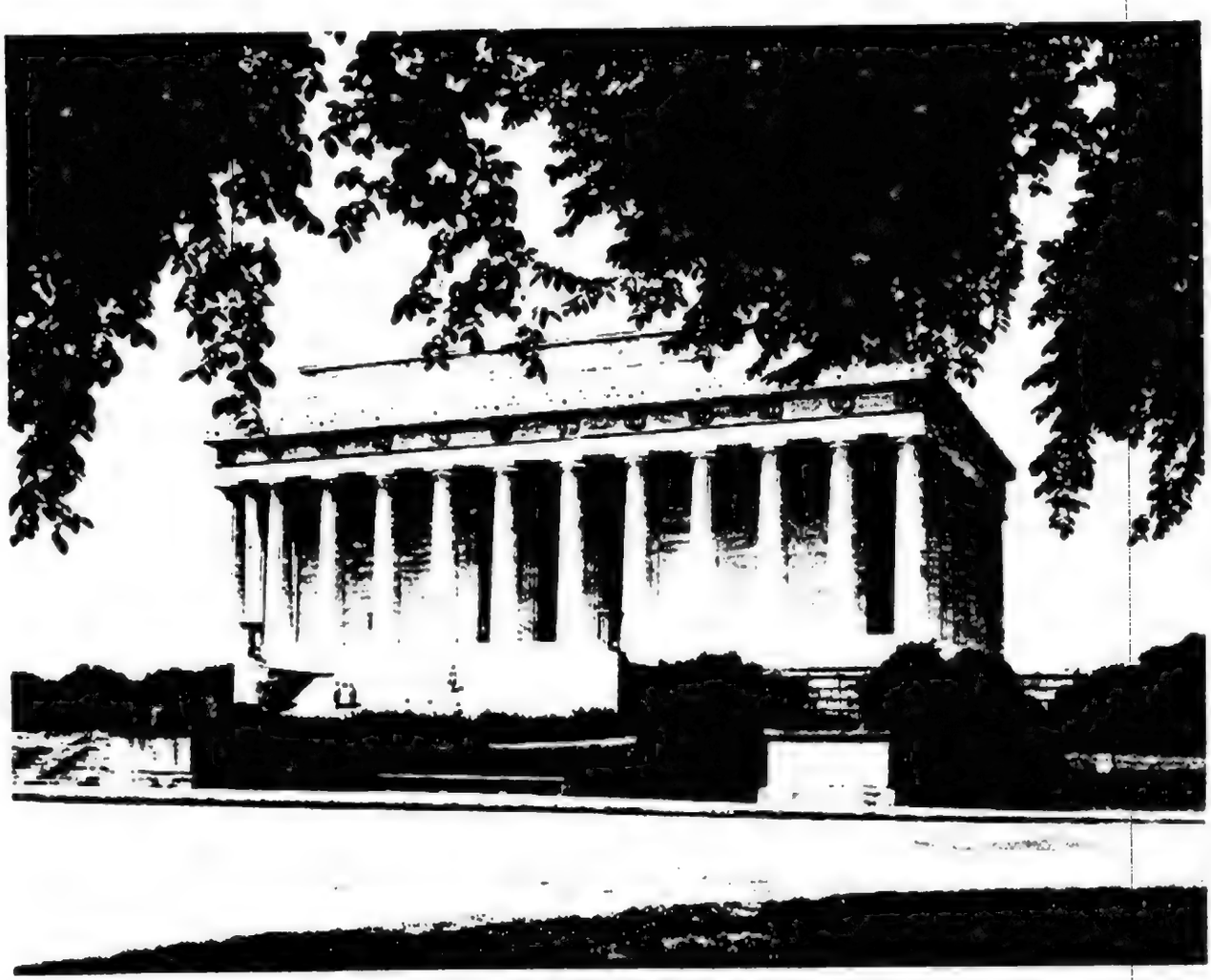
National Park Service approximating 6.5 miles in total length. Some streets under the jurisdiction of the Government of the District of Columbia will be crossed in the interpretive route.

The provision of office space, equipment storage, and shops will be the responsibility of the concessioner. Recognizing however, the limited

facilities available immediately adjacent to the site of operation, the Government will render assistance in locating necessary space including land for housing the operation. A charge will be made for any Government-owned facility made available for the use of the successful concessioner.

Proposed Facilities and Services

In order to provide Visitor Interpretive Shuttle Service considered necessary for public use and enjoyment of the Nation's historic areas, an investment approximating $500,000 will be required for the equipment to be made available as soon as possible. A substantial portion of the investment, in addition to adequate working capital, must be financed by equity capital. A one to two ratio of equity capital to borrowed capital will be considered to be substantial.



Lincoln Memorial

Sufficient equipment will be required to operate three trips per hour within four months after the concession contract has been executed by the Government and sufficient additional equipment to operate a minimum of 12 trips per hour, within one year from such date of execution. The service is to be available between the hours of 9:00 a.m., and 10:00 p.m., from April 15 through Labor Day each year, and between the hours of 9:30 a.m., and 5:00 p.m., the remainder of the year. A time schedule for providing the service will be subject to negotiation with the successful applicant.

The facilities considered necessary to meet the public needs are as follows:

Equipment

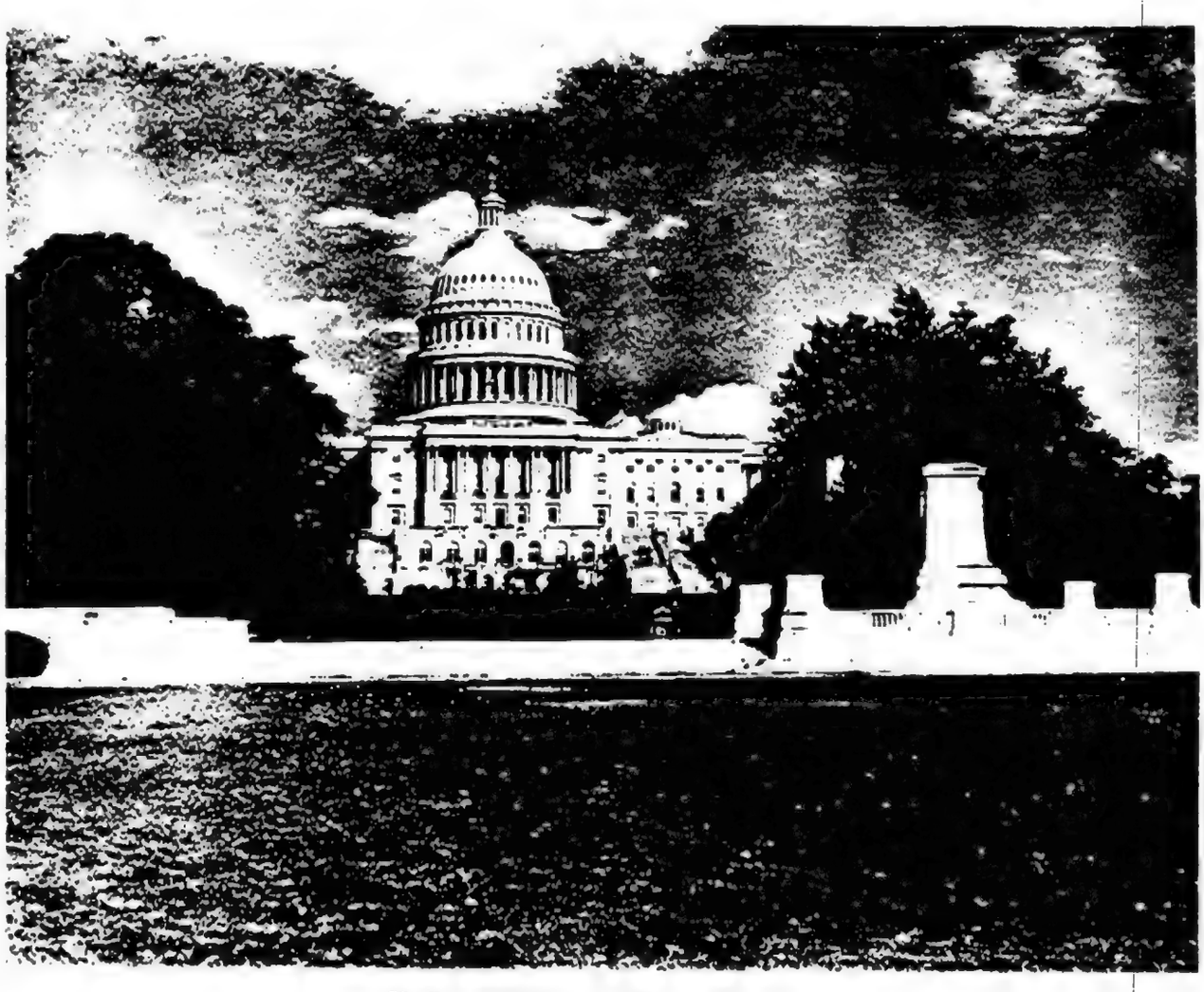
The trackless train system shall consist of an attractive open-air type of equipment to permit a panoramic view of the sites and by its design be compatible to the pleasing total atmosphere of the Nation's Capital. Each complete unit shall have a minimum capacity of approximately 50 passengers and shall contain a sound amplification system. The passenger areas should have solid panels for the protection of the riders. An entrance door and an exit door should be provided in each vehicle with a special locking device to prevent the vehicle from moving while the doors are open. All units to be furnished under this proposal shall meet the ICC safety requirements and those of the District of Columbia. The equipment type, size, and design shall be satisfactory to and be approved by the Regional Director, National Capital Region, National Park Service. Each applicant shall submit with his proposal brochures, drawings, sketches, and photographs of the equipment offered for use under the contract.

The operating speed will not be more than 10 m.p.h.; however, since this equipment will be used in heavy traffic it must have the power capacity of speeds up to 30 m.p.h. fully loaded in order to avoid tieing up traffic in congested areas. It should also have the capability of starting with a full load on a 10% upward gradient and maintain a constant climb at a minimum of 5 m.p.h.

The Government will assist the concessioner in connection with his obtaining permits required for the operation of the Visitor Interpretive Shuttle Service.

The concessioner will be responsible for the upkeep of the tractors and trailers forming the units. Such upkeep shall include provision for full operating efficiency as well as safety considerations. In addition, the passenger units shall be maintained in a clean condition at all times.

Since the route is located on heavily traveled streets, disabled equipment must be removed from the streets expeditiously to avoid traffic tie-up.



U.S. Capitol, West Front

Personnel

a. The concessioner shall be responsible for the hiring of employees necessary to conduct the concession operations.

b. Salaries and hours of work of employees are to conform with all Federal and local laws, rules, and regulations now in force or which may hereafter be promulgated.

c. The concessioner shall comply with the requirements of all Federal and State (including District of Columbia) laws and regulations relating to social security, unemployment insurance, and workman's compensation.

d. The concessioner shall require that employees observe all applicable rules and regulations. Any person in the employ of the concessioner found objectionable to the Secretary shall be subject to immediate dismissal.

e. In addition to having the capabilities of operating and handling the equipment in a safe and businesslike manner, the operators must be courteous, attentive, and of high character. They must be well groomed at all times, and shall wear uniforms of a type and design approved by the Government.

f. Live interpretive service is preferred. However, secondary consideration will be given to the alternative of providing taped interpretive service. Personnel selected to perform live interpretation shall be of the highest quality available to the concessioner, and their on-the-job performance shall be subject to review periodically by the National Park Service.

g. The concessioner shall conduct an orientation program and indoctrinate his interpreters in order that they may properly interpret the sites, answer questions from the visitors, and conduct themselves in a manner creditable not only to the operation but also to the entire interpretation program of the Government. The information upon which the narration will be based shall be furnished by the National Park Service.

Selection of Successful Applicant

It is proposed that a concession contract will be negotiated with the person or corporation selected as the one submitting the best offer in the judgment of the National Park Service. In making this selection offers will be evaluated primarily on the basis of financial strength and ability, managerial competence in the type of enterprise contemplated herein to render the most satisfactory service to the public at reasonable rates, and the equipment proposed to be furnished. In the event two or more

applicants show adequate financing and experience to provide the desired facilities and services, and comparable equipment, the rates to be charged and other factors as may be pertinent will then be considered.

By law the Secretary of the Interior is authorized to negotiate concession contracts for public accommodations and services in areas administered by the National Park Service without advertising or competitive bidding. Accordingly, the offers submitted in response to this prospectus are not subject to the standard Government competitive bid procedures.

The National Park Service will conduct such a survey of each applicant's background as it considers necessary to determine his ability to make the required investment, general competence to operate the concession in a satisfactory manner, and his equal employment opportunity posture.

Submission of Offers

Offers submitted hereunder should be sent to the Regional Director, National Capital Region, National Park Service, 1100 Ohio Drive, S.W., Washington, D. C. 20242 prior to (illegible) 1967 . All offers received will be evaluated promptly thereafter. Any offer received after this date will be given full consideration on its merits if an acceptable offer has not been received by that date. The National Park Service reserves the right to disregard any and/or all offers submitted hereunder or to make any counter offer which may be considered reasonable or desirable.

Data to Accompany Offer

The attached form of offer should be completed by each applicant in such detail as to facilitate a comprehensive analysis. Each applicant should submit with his offer a statement as to his financial condition, evidence of his experience, business and personal references, and a proposed schedule of rates.

If the applicant has participated in any previous contract subject to the provisions of Executive Order 11246 of September 24, 1965, he must submit Compliance Reports on behalf of himself and any proposed subcontractor. Also he should submit a statement in writing signed by an authorized officer or agent of any labor union or other workers' representative with which the applicant deals and with supporting information to the effect that the labor union or representative's practices and policies do not

discriminate on the grounds of race, color, creed, or national origin. Such statement shall provide that the labor union or representative either will affirmatively cooperate, within the limits of his legal and contractual authority, in the implementation of the policy and provisions of Executive Order 11246 or that it consents and agrees that recruitment, employment and the terms and conditions of employment under the proposed contract shall be in accordance with the purpose and provisions of the Order. In the event that the union or representative shall refuse to execute such a statement, the Compliance Report shall be so certified and set forth what efforts have been made to secure a statement.

If the applicant is, or is to be, a newly formed corporation, a financial statement relating thereto should accompany the offer showing the amount of capital pledged or paid in by the stockholders together with personal financial statements of the individual stockholders.

The offer should include evidence of the applicant's financial ability to meet these requirements together with details as to any proposed financing arrangements. The successful applicant must be prepared to show commitments to support such financing arrangement.

The offer should include any additional data that the applicant considers pertinent to the evaluation of his offer. Since the applicant will undoubtedly estimate the amount of gross receipts anticipated from the operation a statement showing such estimate will be of assistance but will not be required.

Rules and Regulations and Objectives

Before submitting an offer the applicant should review thoroughly the National Park Service rules and regulations, particularly those relating to wages and hours of employment and nondiscrimination as they apply to concessioner employees and services to the public. In addition, he should visit the area to familiarize himself with physical conditions surrounding the area and become acquainted with potential problems involved in establishing and operating the services and accommodations contemplated. Applicants wishing to inspect the site of operation should contact the Regional Director. The Regional Director also will furnish interested parties information concerning the Government's objectives in the areas

and other data as may be pertinent to the operation, including the standard language to be used in negotiating concession contracts which illustrates the type of operating rights to be granted.

Accounting System and Reports

The successful applicant will be required to adhere to the System of Account Classification prescribed by the National Park Service. A copy of the system and instructions for its use are available for review in the Regional Director's office (contact Mr. Ray Martinez, room 359, telephone 381-7470). A requirement of the contract negotiated with the successful applicant will be the submission annually of a financial report as prescribed by the National Park Service covering all operations conducted pursuant to the contract. The contract will also provide that the reports and records of the concessioner will be subject to audit by the Secretary. In addition, pursuant to Public Law 89-249, the Comptroller General of the United States or his duly authorized representatives shall have access to and the right to examine any pertinent records of the concessioner related to the operations under the contract.

Charges to the Public

The rates charged for all services rendered under this contract shall be subject to the approval of the National Park Service. In approving rates primary consideration is given to the price charged for similar service furnished or sold outside the areas administered by the National Park Service under similar conditions with due regard being given to such other factors as may be deemed significant. The principal objective of such controls is to assure the public of satisfactory service at reasonable rates.

In working up the rate structure the applicant may consider fares for (1) round-trip ticket, (2) point to point ticket, and (3) all day ticket. Allocation of space for ticket vending at each National Park Service information kiosk located in the Mall or vicinity will be considered by the National Park Service.

Insurance

Reasonable insurance must be carried to protect the public using the concessioner's facilities. The amount of public liability as well as

other types of coverage required will be discussed with those submitting offers. However, the coverage must be in substance of such character and such amounts that the Service and the public will be assured of sound businesslike operations.

Bonds

The successful applicant may be required to file with the National Park Service a bond with an approved surety to guarantee the faithful performance of the obligations under the contract.

Term of Contract

The term of concession contracts under existing policies is to be commensurate with the size of the investment. A term in excess of 10 years is not considered to be appropriate in this instance. Concessioners who have provided satisfactory service during the lifetime of their concession contracts enjoy, pursuant to Public Law 89-249 (79 Stat. 969), a preference in the renewal of their contracts upon the expiration of contracts covering their operations.

As required by law, any proposed contract for a term of more than five years or when annual gross receipts are expected to be $100,000 or more per annum must be submitted to the President of the Senate and the Speaker of the House of Representatives for 60 days before such contract may be executed on behalf of the United States.

Franchise Fee

Under the present policy of the National Park Service the franchise fee to be paid by the concessioner shall be based on a percentage of gross receipts. In this instance a fee of three per cent of the gross receipts will be paid by the concessioner to the Government. This percentage will be subject to reconsideration at the end of the third and seventh years of the contract.

General

The sole purpose of concessions in areas administered by the National Park Service is to provide visitors thereto with such services and accommodations as may be necessary for their full enjoyment of such areas. Accordingly,

the concession herein described shall be conducted under the supervision of the National Park Service so as to provide whatever service the visiting public and others may reasonably expect.

The Regional Director, through his designated representatives, will maintain a continuing inspection service to determine that the concessioner is complying with all provisions of his concession contract. This inspection will include, but not be limited to, the quality of the service rendered and the prices charged the public, neatness of the premises and employees, and nondiscrimination practices of the concessioner with relation to both employment and service to the public. The concessioner and his employees will be required to adhere to the rules and regulations governing areas of the National Capital Region and to cooperate with the Service in meeting the demands of the public.

RECORD OF VISITORS DURING CALENDAR YEARS 1965 and 1966

	January	February	March	April	May	June
Lincoln Memorial						
1965	124,350	168,748	194,084	638,600	508,528	461,972
1966	48,659	124,918	202,801	687,715	538,896	583,136
Washington Monument						
1965	50,899	63,222	107,954	303,828	262,615	267,895
1966	42,937	60,408	137,946	309,661	267,098	265,252
Jefferson Memorial						
1965	17,795	34,923	49,603	360,859	201,615	180,091
1966	14,863	26,820	66,530	294,931	167,098	136,984
White House						
1965	33,746	48,395	72,571	236,811	210,162	226,546
1966	27,376	33,028	75,659	258,579	192,537	182,100

	July	August	September	October	November	December
Lincoln Memorial						
1965	583,070	573,216	305,174	214,428	171,102	96,585
1966	773,263	772,423	324,435	249,895		
Washington Monument						
1965	274,490	275,924	116,788	114,811	187,482	70,724
1966	277,926	325,854	107,664	108,294		
Jefferson Memorial						
1965	285,193	297,632	109,261	79,098	55,882	27,522
1966	148,490	188,463	68,661	77,070		
White House						
1965	249,836	239,454	117,297	105,000	72,830	60,466
1966	212,302	107,956	106,606	100,050		

RECORD OF VISITORS DURING CALENDAR YEAR 1965

1965	Smithsonian Institution	Arts and Industries	Natural Hist. Bldg.	Air & Space Bldg.	Freer Gallery of Art	Museum of Hist. & Technology	Total
January	31,108	45,164	87,386	35,507	6,036	154,464	359,665
February	37,506	56,741	137,132	51,930	7,655	181,950	482,914
March	49,917	77,525	236,954	61,802	10,549	213,102	649,849
April	144,070	261,711	365,848	204,610	29,564	613,636	1,619,439
May	100,563	176,392	309,558	158,965	25,236	530,582	1,301,296
June	101,253	223,752	336,152	210,836	31,015	612,720	1,515,728
July	104,235	277,514	400,278	281,625	35,435	762,067	1,861,154
August	89,686	330,232	468,120	295,850	38,235	812,481	2,034,604
September	52,769	101,193	147,409	90,047	18,417	292,019	701,854
October	51,473	81,121	136,977	64,491	10,934	260,275	605,271
November	45,960	69,481	131,860	54,943	12,222	254,731	569,197
December	32,439	44,254	104,767	42,169	8,750	152,030	384,409
Grand Total	840,979	1,755,080	2,862,441	1,552,775	234,048	4,840,057	12,085,380

Largest number of visitors for one day in one building - July 5, 1965 - Museum of Hist. & Technology - 40,870
Largest number of visitors for one day in all Smithsonian Institution buildings - April 19, 1965 - 109,839
Decrease of 1,688,457 visitors over calendar year 1964

RECORD OF VISITORS DURING CALENDAR YEAR 1966

1966	Smithsonian Institution	Arts and Industries	Natural Hist. Bldg.	Air & Space Bldg.	Freer Gallery of Art	Museum of Hist. & Technology	Total
January	25,417	35,623	79,450	30,941	6,786	108,993	287,210
February	32,038	48,047	114,476	43,752	7,828	131,958	378,099
March	52,474	77,379	159,475	68,114	11,301	203,211	571,954
April	155,167	254,494	500,171	205,112	30,190	737,319	1,882,453
May	102,293	192,079	388,732	146,190	19,642	550,454	1,399,390
June	126,059	235,298	356,291	171,688	22,349	563,574	1,475,259
July	165,841	257,547	454,285	252,829	29,365	753,545	1,913,412
August	185,794	303,231	466,456	298,573	36,059	875,825	2,165,938
September	56,788	93,163	155,393	88,276	16,896	349,938	760,454
October	57,461	80,509	167,290	66,893	12,727	334,442	719,322
November	58,989	85,193	190,620	66,038	13,421	295,808	710,069
December							

O F F E R

Regional Director
National Capital Region
National Park Service
1100 Ohio Drive, S. W.
Washington, D. C. 20242

Dear Sir:

I hereby offer to provide, maintain, and operate an Interpretive Visitor Shuttle Service for the accommodation and convenience of the visitor to the Nation's Capital in accordance with the requirements set forth in the prospectus publicizing this service during the term of 10 years, and to pay annually to the United States for the privilege of so doing an amount equal to three per cent (3%) of the gross receipts.

There are attached the following documents to support my offer to provide the service as set forth:

1. Completed Form EEO-1, if appropriate, for the applicant and any sub-contractor.

2. Statement of financial condition.

3. Statement of experience.

4. Statement of business and personal references.

5. Statement of rates to be charged.

6. Schedule for inaugurating service.

7. Specifications, brochures, drawings, sketches, and photographs of the equipment.

If selected, I agree, within 30 days of notification of acceptance of my offer, to enter into negotiations with the National Park Service for a

contract to furnish accommodations and services as described in the aforesaid prospectus, the provisions of which will be based on the Standard Language for negotiating concession contracts.

Sincerely yours,

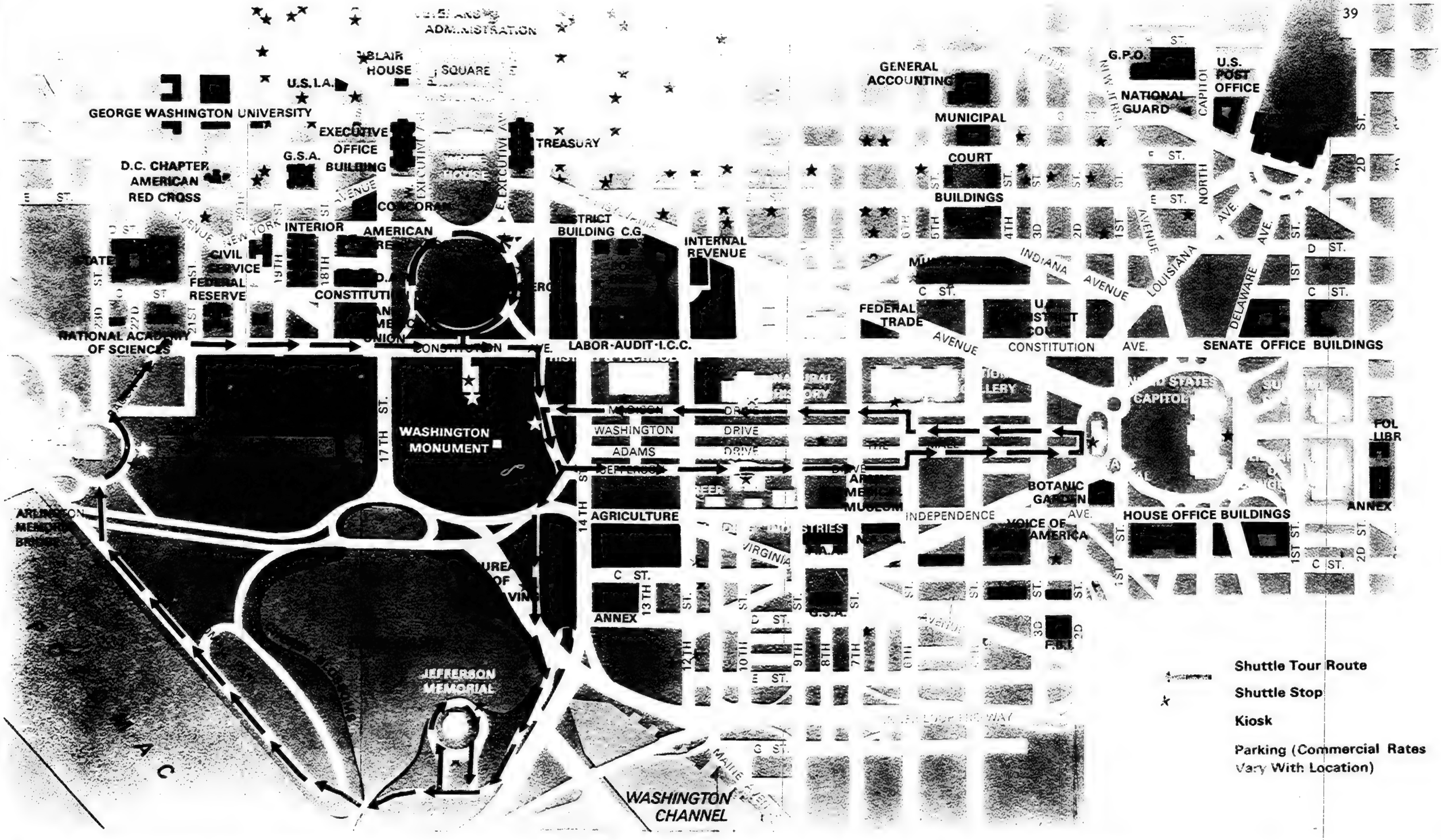
Name_____

Address_____

_____

Telephone_____

Enclosures



REPLY BRIEF FOR THE APPELLANTS

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,031

STEWART L. UDALL, Secretary of the Interior, and GEORGE B. HARTZOG, JR., Director of the National Park Service,

Appellants

v.

D. C. TRANSIT SYSTEM, INC.,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CLYDE O. MARTZ,
Assistant Attorney General.

THOS. L. McKEVITT,
EDMUND B. CLARK,
Attorneys, Department of Justice,
Washington, D. C., 20530.

I N D E X

CITATIONS

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22031

STEWART L. UDALL, Secretary of the Interior, and GEORGE B. HARTZOG, JR., Director of the National Park Service,

Appellants

v.

D. C. TRANSIT SYSTEM, INC.,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

ARGUMENT

I

THE SECRETARY OF THE INTERIOR HAS AUTHORITY TO PROVIDE THE PROPOSED SERVICE FOR PARK VISITORS

Without cross-appealing on the point,[1/] appellee seeks to challenge the district court's

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1/ See Tallman v. Udall, 116 U.S. App. D.C. 379, 324 F.2d 411, 417-418, reversed on other grounds, Udall v. Tallman, 380 U.S. 1 (1965).

conclusion (Conclusion of Law No. 1) that the Secretary of the Interior is authorized to provide the proposed minibus service. Thus, the contention is made that the broad authority granted the Secretary in Section 1 of the Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. sec. 1, to "promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks * * *," is somehow insufficient to permit him to facilitate the movement of Mall visitors from one point of interest to another. Cf. United States v. Gray Line Water Tours of Charleston, 311 F.2d 779, 781 (C.A. 4, 1962).

Appellee seeks to support this contention by citing the Act of August 8, 1953, 67 Stat. 495, 16 U.S.C. sec. 1b, which authorized the Secretary of the Interior to provide transportation for park employees, outside regular working hours, between Carlsbad National Park and the city of Carlsbad. This legislation, however, is

patently irrelevant. The Carlsbad operation was not to be performed within the park for the benefit of park visitors. Instead, it pertained to an extra service for park employees outside the park to cover an obvious need until such time as adequate transportation might otherwise be made available at reasonable rates. Similarly, the fact that the Act of October 9, 1965, 79 Stat. 969, 43 U.S.C. (1964 ed. Supp. II) sec. 20a, encourages the Secretary to use concessionaires in providing facilities is not a limitation on the Secretary's basic authority.

Finally, appellee relies on the fact that an early draft of certain legislation, adopted in 1968, contained the following proposed, but later eliminated, language:

> In connection with his responsibilities to administer any areas in the Mall and its vicinity in the District of Columbia which contain points of intensive visitation or interest, the Secretary of the Interior is directed to utilize the authority in the Act of May 26, 1930 (46 Stat. 382), as amended

> and supplemented, to provide transportation of visitors by the United States when the Secretary deems such action advisable to facilitate such visitation and to insure proper management and protection of such areas. The Secretary is also directed to make provision for such transportation of visitors to the National Visitor Center established pursuant to this Act.

This "Visitor Center" legislation, as adopted on March 12, 1968, 82 Stat. 43, contains the following provision:

> Sec. 104. On or before April 15, 1968, the Secretary shall report to Congress the results of a full and complete investigation and study of the problems of transporting visitors along the Mall and its vicinity in the District of Columbia, on the United States Capitol Grounds, and to and from the National Visitor Center, including but not limited to, types of transportation to be utilized, the operation of any such transportation system, the feasibility of providing free transportation for visitors on all or any portion of such system, proposed legislation to carry out his recommendations.

The fact that Congress decided to defer consideration of a suggested directive to exercise an

existing power to provide transportation by means of a contract with a private concessionaire, however, is in no way a limitation on the Secretary's authority to provide this service as a direct operation of the National Park Service. See United States v. California, 332 U.S. 19, 26-27, where it was said:

> It is contended that we should dismiss this action on the ground that the Attorney General has not been granted power either to file or to maintain it. It is not denied that Congress has given a very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government rights and properties. The argument is that Congress has for a long period of years acted in such a way as to manifest a clear policy to the effect that the states, not the Federal Government, have legal title to the land under the three-mile belt. * * *
>
> * * * * *
>
> But no Act of Congress has amended the statutes which impose on the Attorney General the authority and the duty to protect the Government's interests through the courts. See In re Cooper, 143 U.S. 472, 502-503. That Congress twice failed

> to grant the Attorney General specific authority to file suit against California, is not a sufficient basis upon which to rest a restriction of the Attorney General's statutory authority. * * *

Nor can it possibly be concluded that because Congress has called for a report on the related problems of transporting visitors within the Mall and the Capitol grounds and to and from the newly created National Visitors Center, with special reference to the feasibility of providing a free service, there has been an implied repeal of the Secretary's long-standing general authority to "promote and regulate the use of the Federal areas known as national parks * * *." See United States v. United Mine Workers, 330 U.S. 258, 287.

II

THE PURPORTED FRANCHISE RIGHTS OF THE APPELLEE NOT ONLY DO NOT APPLY AS AGAINST THE UNITED STATES BUT HAVE NO APPLICATION TO THE SERVICE THE UNITED STATES INTENDS TO PERFORM

Appellee's objections to application of the rule that general statutes imposing restrictions do not

impose them on the Government, United States v. Wittek, 337 U.S. 346, 358 (1949), only highlight the desirability of confining this case to its facts. The case does not involve an attempt on the part of the United States to operate a "competitive street railway or bus line" in the District of Columbia of the type contemplated by appellee's franchise. Instead, the United States is merely attempting to facilitate the movement of visitors through a national park in the District of Columbia.

Whether this basic fact is arrived at only by consideration of the Secretary's announced intention or by the semantic route of concluding that the United States is not planning to operate a bus line which runs "over a given route on a fixed schedule" within the meaning of appellee's franchise, the result is the same. The appellee is simply attempting to confuse the issue by contending (a) that what the United States intends to do is to operate a competitive bus or railway line or (b) that the proposed service will in some way

affect the operations of the appellee's regularly scheduled lines running on streets that cross the Mall. What is involved in this case, as far as appellee is concerned, is its sightseeing operations--and even those operations are entirely different in scope than the service contemplated by the United States.

III

SIGHTSEEING OPERATIONS ARE NOT WITHIN THE PROTECTION OF THE APPELLEE'S FRANCHISE

Elsewhere, appellee has acknowledged that there is a distinction between "sightseeing" or "irregular" route operations and its so-called regular route operations. In a brief filed in the pending related litigation in the Supreme Court, the following is stated on this point:

> It is true that sightseeing or irregular route operations are normally distinguishable from regular route operations in two respects:
>
> 1. The former generally operate according to pre-arranged schedules but may vary such schedules without Commission permission (or not run a

> particular trip if the demand therefor is inadequate); the latter must operate strictly according to schedule irrespective of the public demand, the Commission's permission being a prerequisite to a scheduling change.
>
> 2. The former generally follow an established route but may vary such route without Commission permission; the latter must follow their established routes, making changes therein only after Commission permission has been obtained.

As indicated in our earlier brief, appellee's sightseeing operations are authorized by section 6 of its franchise which permits it "to engage in special charter or sightseeing services * * * subject to compliance with the applicable laws of the District of Columbia and the states in which such operations take place." This specific authorization indicates clearly that Congress did not intend to include sightseeing services within the appellee's section 3 franchise rights. Had Congress regarded section 3 as including permission to operate sightseeing services, it would not have been necessary to add section 6 to the franchise.

Appellee's position results in making section 6 a mere redundancy, thus offending the rule that statutes must be construed as a whole. Abbot v. Bralove, 176 F.2d 64, 65-66 (C.A. D.C. 1949).

The mere fact that a sightseeing business may be a good one, i.e., involve the movement of a large number of people in a year, does not make it "mass transportation" within the meaning of section 1 of the franchise act. Admittedly, section 6 also permits sightseeing operations beyond the Washington metropolitan area but this grant of authority only brings into focus the fact that section 6 grants rights exclusive of and in addition to the rights referred to in section 3.

CONCLUSION

The action of the court below in granting a preliminary injunction should be reversed.

Respectfully submitted,

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Assistant Attorney General.

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Washington, D. C., 20530.

JUNE 1968.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,031

STEWART L. UDALL, Secretary of the Interior, et al,

Appellants

v.

D. C. TRANSIT SYSTEM, INC.,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,031

STEWART L. UDALL, Secretary of the Interior, et al,

Appellants

v.

D. C. TRANSIT SYSTEM, INC.,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

Appellee, D. C. Transit System, Inc. ("Transit"), respectfully petitions this Court, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for a rehearing of a decision of this Court, dated July 30, 1968, reversing an order of the District Court granting a preliminary injunction in the above-captioned proceeding. As grounds for this petition, Transit states as follows:

There were two factors which primarily motivated this Court to set aside the preliminary injunction granted by the District Court. First, this Court focused on what it considered to be "vital differences between the operation the Secretary now proposes and appellee's regular route and sightseeing services in the vicinity of the Mall",

concluding that the "Secretary's small interim venture would not inflict financial injury to appellee of the magnitude envisioned by the District Judge". (Opinion, pp. 3-4) Secondly, this Court underscored its inability to find "any indication that the public weal was placed on the scale". (Opinion, p. 5) It is respectfully submitted that this Court has misapprehended both factors.

Respecting the first factor, the Court apparently placed great weight on the fact that the proposed service would endure "only until the litigation in the Supreme Court is resolved", Washington Metropolitan Area Transit Com'n. v. Universal Interpretive Shuttle Corp., Nos. 20,975-78 (D.C. Cir. June 30, 1967), certiorari granted 390 U.S. 643 (1968), and the fact that "counsel for the Secretary represents that only two vehicles would be used". On such basis the Court determined that the proposed service was merely a "small interim venture".

The whole problem with such determination is that neither the Court nor Transit can guess just how long the Supreme Court will take to decide the pending Universal case. It may well be nearly a year before such decision is rendered. In addition, neither the Court nor Transit can be assured that only two vehicles will be used. While only two vehicles may be immediately available, there is no reason to believe that in the ensuing

weeks the Secretary will not use many more vehicles in the proposed service -- as many as are required by the demand therefor. Under these circumstances, it is clear to Transit that the proposed service is substantially more than a mere "small interim venture".

Moreover, the so-called "vital differences" between Transit's existing services and those proposed are, to some extent, not differences at all. More importantly, to the extent that such "vital differences" do exist, their impact is to heighten competition not lessen it.

Taken in the order discussed by the Court under note 6 on page 3 of the Opinion, Transit's buses in the Mall utilize not only streets in the Mall over which the District of Columbia Government exercises jurisdiction but also streets over which the Federal Government exercises jurisdiction. A comparison of the route to be operated by the appellants, as depicted on the Map attached to the Prospectus issued by the National Park Service (pages 37-8 of Transit's brief), and the routes being operated by Transit, as depicted on Exhibits 3-6 attached to the Supplemental Affidavit of William E. Bell in support of the motion for preliminary injunction, clearly indicates the substantial similarity between the two routes.

Next, Transit's fixed routes traverse streets not only on the perimeters of the Mall but also within the heartland thereof. For example, as shown on Exhibits 1-2 attached to the aforenoted Supplemental Affidavit of William E. Bell, portions of the 22 regular routes operated by Transit through the Mall Area traverse 14th, 12th, 7th, 4th and 1st Streets which certainly represent the "broader dimensions" of the Mall.

Respecting such regular-route operations, it is true, as suggested by the Court, that no interpretive commentary is provided on the buses used on these runs. However, it is submitted that such fact in no way detracts from the competitive impact which the proposed service will have on Transit's existing regular-route service. As observed by Judge Holtzoff on page 5 of his Opinion of May 27, 1968:

> The mere fact that its [proposed service] purpose is to instruct visitors and to provide a lecturer on buses does not detract from the fact that it is, nevertheless, a bus line for the transportation of passengers.

In this connection, as noted on pages 2-3 of Mr. Bell's Supplemental Affidavit, many visitors to Washington now use Transit's regular-route service solely to travel between points located on the Mall such as between the Capitol and the White House. These visitors are

receiving such transportation for 25¢ token or 27¢ cash. If the appellants are permitted to commence the proposed service, these same visitors will be able to use appellants' equipment to make their journey for the same charge and with the added attraction of an interpretive lecture. Can there be any reasonable doubt that such existing traffic will be substantially diverted to the appellants' proposed operation? It would seem not.

In short, it would seem clear that this "vital difference" between Transit's existing regular-route service and the appellants' proposed service is, from a competitive standpoint, the very factor which makes the latter a financial threat to the former.

Turning now to the Court's notation of the "vital differences" between Transit's existing sightseeing services and appellants' proposed sightseeing services, the fact that Transit's buses are not allowed to pick up passengers inside the Mall surely does not make the two services non-competitive. Rather, such fact clearly provides the proposed service with a distinct competitive advantage over existing service. The visitor who desires an interpretive tour of the Mall will undoubtedly prefer to originate his tour directly from the Mall and not from Transit's sightseeing headquarters at 1422 New York Avenue, N. W. Such preference, from the standpoint of its

competitive impact upon Transit, will unquestionably cause a substantial diversion of a portion of Transit's present sightseeing business, its daily tours of the Mall sold on an individual basis, to the appellants.

Next, the Court cites the substantial differences in the cost and time of the present and proposed tours. Here again it would seem obvious that such differences will produce a profound competitive impact on Transit. A visitor paying $6.00 for a four-hour Transit tour of public buildings located almost entirely within the Mall (Tour No. 1 shown on the brochure entitled "Sightseeing in Washington, D. C. & Vicinity" attached to Transit's Complaint) can be expected to prefer appellants' proposed one-hour tour, for 25¢, of many of the same buildings. Such preference is readily translatable, in competitive terminology, into diverted traffic.

In the final analysis, then, the proposed service and Transit's existing sightseeing service (Tour No. 1 in particular) have the following three essential characteristics in common which establish their fundamentally competitive nature:

1. Attract the same class of persons -- visitors to the Nation's Capital,
2. Provide the same type of service -- interpretive, guided sightseeing tours,

3. Visit the same points of interest on the Mall.

While, at the same time, there are certain "vital differences" in the two services, such differences will only accentuate the adverse competitive effect of the proposed service upon the existing service.

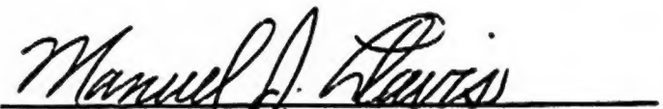
It should be emphasized, in passing, that the amount of money Transit will lose as a result of the proposed competition cannot be projected with any reasonable certainty. What is certain, however, is the fact that such loss will constitute an irreparable injury to Transit because revenues lost by a common carrier can never be recouped through the fare box. In Capital Transit Company v. Riley E. Elgen, Civil Action No. 971, D.D.C. January 19, 1939, a proceeding in which Transit's predecessor invoked the protective provisions of Section 4 of the Merger Act of 1933, 47 Stat. 760, D.C. Code (1967 Ed.) §44-201, which are identical in substance to the provisions of Section 3 of Transit's Franchise, 70 Stat. 598, in issue herein, it was held that a diversion of traffic causing a net annual revenue loss of only $20,000 would "work irreparable injury, loss and damage".

With regard to the public interest factor, the Court has apparently overlooked the effect of the proposed service upon the local fare-paying public. These

daily users of Transit will actually bear the brunt of any substantial losses incurred by Transit as a result of traffic diverted to the appellants' service. The revenues Transit receives from its sightseeing operations help maintain the financial stability of its regular route operations. To the extent that these revenues are substantially diverted or lost to another carrier, even for a temporary period, the daily regular-route riders will ultimately be called upon to offset such losses through the payment of increased fares. Accordingly, it is in the interest of not only Transit but also the hundreds of thousands of local residents using its services daily that the District Court enjoined the proposed service pending determination of the validity thereof.

WHEREFORE, Transit respectfully requests this Court to grant this petition for rehearing.

Respectfully submitted,



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